United Pacific Reliance Insurance, Inc. *and* William J. Whitman. Case 19-CA-12826

31 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 14 June 1982 Administrative Law Judge Harold A. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a motion to strike the Respondent's exceptions, a brief in support of the motion, and a brief in support of the decision. The Respondent filed a reply to the General Counsel's motion to strike.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) by maintaining and enforcing an overly broad no-distribution rule and by discharging employee William J. Whitman pursuant to that rule. We agree with the judge that the rule was invalid and its maintenance constituted an 8(a)(1) violation. However, we find merit in the Respondent's exception to the discharge finding. We therefore shall reverse the judge and dismiss that portion of the complaint.

For the reasons set forth below we find that Whitman's publicizing and conducting of his "lottery" was not protected activity within the meaning of Section 7 of the Act. We further find that he was discharged on 26 September 1980 not for failing to comply with the invalid rule but for breaking a private written agreement between himself and the Respondent entered into on 24 September. Accordingly, we also reverse the judge's finding that the Respondent unlawfully enforced the invalid rule as to Whitman.

Whitman was employed as a loss control representative in the Seattle branch office of the Respondent's insurance business. On 23 September 1980 Whitman distributed a "memo" on company premises during the lunch break to all "non-technical" or clerical employees in the office. The memo was "from" Whitman and announced the subject as "Seattle Branch Poor Persons Lottery." It read in pertinent part:

> This is to announce the first biweekly poor persons lottery.
>
> The purpose of the lottery is to dispose of my net salary increase for the coming year . . . . You see, when I was advised of my raise in pay and compared it with the rate of inflation, I advised "The Company" they could keep it (by accepting the raise, I would be giving tacit approval to both the amount/percentage and the methods/policies by which it was determined). However, "The Company" would not accept return of the raise—hence the "lottery."

The lottery memo was authored by Whitman, typed by a fellow technical employee, and reproduced by Whitman away from company premises and after working hours. Whitman distributed the memo with knowledge of and in accord with a rule published in the employee handbook which read, in pertinent part:

> 2. All peddling, canvassing, soliciting and distribution of literature of any kind on Company premises by an employee is prohibited (1) during such employee's working hours, or (2) during such employee's non-working hours when such peddling, canvassing, etc., is made to employees who are then engaged in the performance of their duties.

The validity of this rule is not challenged by the General Counsel and is not in issue.

The following day, however, Branch Manager James Wuerch informed Whitman that the memo distribution was in violation of a rule in the personnel manual, not known to Whitman, which stated, inter alia:

> All canvassing, peddling, soliciting, and distribution of literature of any kind on Company premises *by an employee* is strictly prohibited.

Wuerch then prepared a memo directed to Whitman's personnel file which was signed by both of them. It read:

> The memo by Bill Whitman distributed to the employees regarding a drawing for the increase on his paycheck required a meeting with Bill regarding our policy on employee canvassing, peddling, soliciting and distribution of literature of any kind on our premises by an employee is strictly prohibited. [sic] Bill has

[1] Counsel for the General Counsel filed a motion to strike the Respondent's exceptions and brief on the grounds that they do not comply with Sec. 102.46(b) and (c) of the National Labor Relations Board Rules and Regulations. We have examined the exceptions in light of the supporting brief and conclude that the Respondent has substantially complied with the specificity requirements of Sec. 102.46(b) and (c). In these circumstances, we shall deny the General Counsel's motion to strike.

> agreed not to hold his drawing, hand out literature or discuss his drawing on our premises. Failure to comply with this requirement means immediate dismissal.

After this meeting, Whitman prepared a sign and placed it on his desk. It read:

> I can't talk about "It" during working hours or I'll be fired.

That evening after work Whitman and several coworkers held the lottery at the home of one of them and drew the name of the winner. The following day, 25 September, Whitman delivered his personal check for his net increase to the winner in the building lobby and then added to his desk sign the phrase "Lucky Person Patty Saito."

On 26 September Whitman was called to a meeting with Wuerch for a further discussion of the lottery. Whitman immediately requested that the 24 September agreement be amended to allow him to discuss the subject without being subject to dismissal. Wuerch then terminated Whitman. Whitman testified that he was told that he was dismissed because he had violated the memo agreement by displaying the sign on the desk. Wuerch testified that the discharge was both for the violation of the agreement and for insubordination in refusing to engage in further discussion of the lottery and the agreement.

The judge found that Whitman's initial lottery distribution was both concerted and protected and that Whitman conceived, promoted, and conducted the lottery as a protest against the Respondent's wage policies. The record shows, as found by the judge, that management policy for 1980 wage increases was to have them average 8 percent. When Whitman received an 8-percent raise in August 1980 he protested directly to his supervisor that it was too low compared to the inflation rate. Also prior to the lottery Whitman spoke out on his opposition to the wage policy in employee meetings attended by management officials.

We agree with the judge that the wage policy was a matter of interest to a number of Whitman's fellow employees and one of "considerable impact on Respondent's employees generally." In addition, several employees agreed with Whitman that the 8-percent average figure was too low. However, the record shows that Whitman alone conceived the idea for the lottery format as his own personal protest. The judge found that an employee's typing of Whitman's draft memo and the attendance of several employees at employee Cathy Swanson's home for the drawing constituted sufficient support to convert Whitman's otherwise individual efforts into concerted activity within the meaning of Section 7.

We disagree and find that Whitman was engaged in a purely personal protest when he publicized and conducted his lottery. Whitman alone conceived the lottery idea, drafted the memo, and signed and distributed it and only his "raise" was at stake. The assistance rendered Whitman by fellow employees in typing the memo and providing a place to hold the drawing was simply not sufficient to transform their general agreement with Whitman on his opposition to the wage policy into participation with him in his lottery project, which clearly amounted to a frolic of his own.[2]

As most recently set forth in *Meyers Industries*, 268 NLRB 493 (1984), activity is concerted when it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." As found above no other employee "engaged" in the lottery project with Whitman and certainly there is no evidence that any employee "authorized" Whitman to carry out his plan on his or her behalf.[3]

Whitman was discharged pursuant to the Respondent's judgment that his adding the name of the lottery winner to the sign on his desk constituted a breach of the 24 September memo agreement between himself and Wuerch. While it is true that the memo cited an invalid no-distribution rule, Whitman was not discharged for having violated the rule. Rather it is clear that he was discharged for further pursuing his personal wage protest in violation of their private agreement. By signing the memo Whitman clearly understood that he would be dismissed if he failed to comply with the agreement not to hold his drawing, hand out literature, or "discuss his drawing on our premises." Since Whitman's lottery project from inception through implementation was not concerted activity and thus not protected by the Act we need not inquire further into the Respondent's evaluation of Whitman's behavior on 25 September.

We therefore shall dismiss the 8(a)(1) allegations as to the enforcement of the invalid rule and the dismissal of Whitman. We shall, however, provide a remedy for the Respondent's 8(a)(1) violation in maintaining the overly broad no-distribution rule in its personnel manual.

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[2] Indeed, Cathy Swanson testified that she and two other employees had discussed Whitman's lottery idea with him prior to 23 September. She stated, "If he felt this was something he needed to do, I wasn't against him. It was maybe not something I, myself, could have handled doing but I wasn't against him proceeding with what he felt."

[3] Member Zimmerman agrees that Whitman was engaged in a purely personal wage protest and does not rely on *Meyers Industries*, supra.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation, no-distribution rule which prohibits employees from engaging in protected concerted activities in nonworking areas of the Respondent's premises during nonworking time.

3. The Respondent has not otherwise violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, we shall order it to cease and desist and to rescind or modify the rule appearing in its personnel manual so that it does not prohibit distribution of literature or solicitation for purposes protected by Section 7 of the Act by employees in nonworking areas of the Respondent's premises during nonworking time.

ORDER

The National Labor Relations Board orders that the Respondent, United Pacific Reliance Insurance, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any rule that prohibits employees from distributing literature or soliciting for purposes protected by Section 7 of the Act during nonworking time in nonworking areas of the Respondent's premises.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or modify the rule or policy statement appearing in its personnel manual so that it does not prohibit distribution of literature or solicitation for purposes protected by Section 7 of the Act by employees in nonworking areas of the Respondent's premises during nonworking time.

(b) Post at its place of business copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain any rule that prohibits employees from distributing literature or soliciting for purposes protected by Section 7 of the Act during nonworking time in nonworking areas of our premises.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind or modify the rule or policy statement appearing in our personnel manual so that it does not prohibit distribution of literature or solicitation for purposes protected by Section 7 of the Act by employees in nonworking areas of our premises during nonworking time.

UNITED PACIFIC RELIANCE INSURANCE, INC.

DECISION

STATEMENT OF THE CASE

HAROLD A. KENNEDY, Administrative Law Judge. Respondent, United Pacific Reliance Insurance, Inc., is charged in this proceeding with violating Section 8(a)(1) of the National Labor Relations Act through the use of "an overbroad" no-solicitation/no-distribution rule and by discharging, about September 26, 1980, employee William J. Whitman for "having engaged in protected concerted activities."[1]

I have considered the whole record, including testimony and exhibits received at the trial held in Seattle, Washington, on October 6 and 7, 1981, and have con-

[1] All dates herein are for in 1980, unless stated otherwise. Whitman filed a charge on October 1 with the Regional Director for Region 19 who issued a complaint on November 28.

cluded that Whitman was unlawfully terminated.[2] I will therefore enter a recommended order calling for Whitman's reinstatement with backpay. I also find that Respondent promulgated and enforced an invalid no-solicitation/no-distribution rule.

The following matters are established by the pleadings or undisputed evidence.

1. Respondent is a Washington corporation, has offices in Seattle, and is engaged in the selling, servicing, and underwriting of insurance.

2. Respondent's annual gross exceeds $500,000.

3. More than $50,000 of Respondent's business is done either with customers located outside of the State or with customers engaged in interstate commerce by other than indirect means.

4. Respondent is an "employer" engaged in commerce within the meaning of the Act.

5. The following persons are agents and supervisors of Respondent as such terms are used in the Act: James Wuerch, branch manager; Gary Sagara, administrator manager; John Gordon, vice president and director of human resources.

6. Respondent terminated Whitman on September 26 and has failed and refused to reinstate him to his former or to a substantially equivalent position.

7. Whitman was employed in Respondent's Seattle branch office which occupied the entire third of the Denny Building located on Sixth Avenue in Seattle.[3] Respondent's home office is located on Federal Way in Seattle where Vice President Gordon maintains his office.[4]

8. On September 23 Whitman distributed to clerical (nontechnical) employees of Respondent on company premises during lunchtime a memorandum announcement which read (G.C. Exh. 5):

> TO: ALL NON-TECHNICAL EMPLOYEES, SEATTLE BRANCH
> FROM: BILL WHITMAN, LOSS CONTROL REPRESENTATIVE
> SUBJECT: SEATTLE BRANCH POOR PERSONS LOTTERY
>
> This is to announce the first biweekly poor persons lottery.
>
> The purpose of the lottery is to dispose of my net salary increase for the coming year (effective 9-25-80 paycheck). You see, when I was advised of my raise in pay and compared it with the rate of inflation, I advised "The Company" they could keep it (by accepting the raise, I would be giving tacit approval to both the amount/percentage and the methods/policies by which it was determined). However, "The Company" would not accept return of the raise—hence the lottery.
>
> The lottery is very simple:
>
> 1. Amount. Approximatley $40.00 per payday, tax free (it is the net amount of my increase, on which I've paid the taxes).
> 2. Persons eligible. All Seattle Branch non-technical employees—the poorest persons in this office. A new winner will be chosen each payday.
> 3. Selection of winners. Random drawing at coffee break each payday.
> 4. Obligation of winner. None, unless you want to buy me a beer.
>
> Should you not wish to participate in the lottery, simply notify me (during nonworking hours) prior to the drawing on payday, and your name will be removed from eligible participants for this and future drawings.

9. The memorandum had been drafted by Whitman and typed up by a friend and coworker Tucky Williams away from Respondent's office and after hours. Copies of the memorandum were distributed by Whitman in accord with a policy statement appearing in Respondent's employee handbook that read (G.C. Exh. 6):[5]

> Canvassing or Solicitations
>
> The success of any business enterprise depends to a great extent upon the efficiency of its employees. For this reason, it has been the longstanding policy of the Reliance Insurance Companies to prohibit peddling, canvassing, soliciting and distribution of leaflets, pamphlets, etc., of any kind on Company premises during working hours since such activities can disrupt office procedure and impair our efficiency.
>
> 1. All peddling, canvassing, soliciting and distribution of literature of any kind on Company premises at any time by non-employees is prohibited.
>
> 2. All peddling, canvassing, soliciting and distribution of literature of any kind on Company premises by an employee is prohibited (1) during such employee's working hours, or (2) during such employee's non-working hours when such peddling, canvassing, etc., is made to employees who are then engaged in the performance of their duties.
>
> The observance of these rules by all employees should assist materially in our efforts to improve our over-all efficiency.

10. On the following day, September 24, Respondent's branch manager Wuerch summoned Whitman to the former's office and discussed (1) Whitman's lottery memorandum of September 23 and (2) a policy statement appearing in the Company's personnel manual. Whitman told Wuerch at that time that he was not aware of the

[2] Certain errors in the transcript are hereby noted and corrected.

[3] A diagram of the third floor showing the layout of Respondent's Seattle branch is in evidence as E. Exh. 5. Whitman's desk, the lunchroom, and other areas are identified on the exhibit. In 1980 Respondent also had under lease a portion of the seventh floor of the Denny Building for housing of "processing center."

[4] Gordon testified that Respondent has approximately 1600 employees working in the Company's headquarters and 20 branch offices located in the States of Washington, Idaho, Montana, Oregon, California, Arizona, Utah, and Hawaii.

[5] The validity of the rule contained in Respondent's employee handbook was not challenged by the General Counsel and is not in issue.

personnel manual's policy statement which read (G.C. Exh. 2):

> II. *EMPLOYEE CANVASSING*
>
> *Policy Statement*
>
> All canvassing, peddling, soliciting, and distribution of literature of any kind on Company premises, at any time, *by a non-employee* is strictly prohibited. All canvassing, peddling, soliciting, and distribution of literature of any kind on Company premises *by an employee* is strictly prohibited.
>
> Any employee who sees a stranger or employee in their work area or on Company property performing such canvassing, peddling, soliciting and/or distributing literature, should proceed as follows:
>
> A. Notify the supervisor or the security personnel immediately.
>
> B. The employee should provide security personnel with a physical description of the trespasser, as well as the present or probable location of the individual.
>
> C. At no time should a trespasser be apprehended or physically detained by an employee (to ensure against having civil or criminal charges brought against an employee).
>
> D. In the field offices, the managers in charge should courteously request the trespasser to leave the premises. If this fails, notify local authorities.
>
> E. *If an employee is soliciting, peddling, canvassing or distributing literature,* and fails to heed directions to desist, the employee should be suspended immediately and the H. O. Personnel Department advised before further action is taken.

11. Whitman was again summoned to Wuerch's office later on the same day, September 24, and was asked by Wuerch to sign a memorandum relating to Whitman's lottery memorandum. He and Wuerch both signed the memorandum, and each placed the date next to their signatures. The memorandum—which was typed on company "interoffice correspondence" letterhead, dated and captioned so it indicated it was emanating from Jim Wuerch and directed to the personnel file of Bill Whitman—read (G.C. Exh. 4):

> The memo by Bill Whitman distributed to the employees regarding a drawing for the increase on his paycheck required a meeting with Bill regarding our policy on employee canvassing, peddling, soliciting and distribution of literature of any kind on our premises by an employee is strictly prohibited. Bill has agreed not to hold his drawing, hand out literature or discuss his drawing on our premises. Failure to comply with this requirement means immediate dismissal.

12. After signing the memorandum in Wuerch's office as requested, Whitman prepared a sign, using a piece of brown cardboard, which read (G.C. Exh. 7):

> I CAN'T TALK ABOUT "IT" DURING WORKING HOURS OR I'll BE FIRED.

Whitman placed the sign on top of an in-basket on his desk. When asked about the lottery by coworkers, Whitman would show them the sign.

13. A drawing was thereafter conducted after work by Whitman on September 24 (the night before payday) at the home of a coworker, Cathy Swanson. Present at the drawing, in addition to Whitman, were three other employees of Respondent, C. Swanson, Becky Scholl, and Barbara Layland. Whitman had placed the names of nontechnical employees in a hat, and a young girl pulled out the name of Patty Saito.

14. On the following morning, Spetember 25, during the employees' coffeebreak, Whitman delivered his personal check for approximately $31.[6]

15. On the same day, September 25, Whitman added to his cardboard sign the words, "LUCKY PERSON PATTY SAITO."

16. On the following morning, September 26, Whitman was summoned to Wuerch's office where he found Wuerch and Gary Sagara sitting and waiting for him. Wuerch sought to engage Whitman in a conversation about the lottery, but Whitman declined to talk about it unless the two officials would "amend the (September 24) memorandum to allow [Whitman] to discuss it." Whitman was then told by Wuerch that he was being terminated.[7]

17. Whitman telephoned Vice President Gordon in the head office in Federal Way on the following Monday afternoon (September 29) to inquire about a possible appeal of his termination. Gordon told Whitman he would speak to Wuerch and then advise Whitman. Gordon thereafter called Whitman and advised the decision remained the same.

Charging Party James L. Whitman testified that he was employed by United Pacific Reliance from July 11, 1979, to September 26, 1980. He was employed as a loss control representative—a job he described as involving the evaluation of businesses that were seeking commercial insurance from Respondent—and worked under Orville Swanson.

Whitman indicated that he and two other employees in his department, Ron Seay and Tucky Williams, had discussed salary administration—"the salary range, and the timing and the amount of pay increases"—for a period of more than a year before he learned on August 29, 1980, that he was to get a raise. The raise, he said, had been delayed for 2 weeks and was only for 8 percent, "substantially below the prevailing rate of inflation." The notification of the raise came to him in the form of a 3 x 5 inch index or "recipe" card which showed that his salary was being raised from $19,006 to $20,527 on an annual basis ($29.25 per week and $127 per month). With infla-

[6] Whitman said he had arranged to meet Saito in the lobby of the building and then asked her to step outside as he was "taking some heat on this thing." Said Whitman: "I apologized that it was somewhat less than the 40 dollars I quoted in my memo, it came out to thirty-one dollars and some cents. I gave her the check and told her to do whatever she liked with it and then I went on to coffee."

[7] Whitman said that "they stated that in their view I had violated this memo by holding up the paper at my desk" and "said I was terminated." Wuerch said he terminated Whitman "for violating an agreement between him and myself, plus insubordination."

tion "running 14 to 16 percent" at the time, he said, he decided after some reflection that in good conscience he could not accept the raise. He wrote the word "declined," along with his name and date, on the index card and gave it to Supervisor Swanson, explaining:

> . . . I cannot accept the raise because I don't agree with it and if I were to accept it that would lend at least tacit approval of both the amount and the manner in which it was derived. . . .

On the afternoon of September 2, when Supervisor Swanson stopped at Whitman's desk, Whitman repeated that he could not accept the raise. Whitman agreed at his supervisor's request to speak with Gary Sagara, Respondent's personnel administrator for its Seattle branch, about the matter and did so that afternoon. Whitman described his conversation with Sagara as follows:

> . . . I explained to Gary, as I had twice previously with Orv, that I could not accept the raise and the reason why. I disagreed with the amount, it was not in keeping with inflation, for one, and I disagreed with the manner in which it was arrived at. Gary stated that I couldn't return the raise but that I could give it to charity, the United Way Campaign, to be specific.

Sagara told Whitman that there was no way to turn the money back to the Company.

Whitman stated that he and other members of the loss control department, consisting of Seay, Williams, and Jack HasBrouck, met with Supervisor Swanson on September 11 to discuss two items of concern to such employees, viz, work processing and salary administration. Seay, a "good friend" who had recommended Respondent hire Whitman, addressed the issue of work processing. Whitman spoke on salary administration—without success. Whitman stated that he had previously discussed this subject with Seay and Williams and other employees in other departments—Cathy Swanson (group), Becky Scholl (life insurance), and Barbara Leland (Bonds)—and had told them that he was going to protest the Company's salary administration in the form of a lottery for the nontechnical staff. He indicated that he had already compiled a list of the nontechnical people in the office—the clericals, "file people, typists, that type of thing," whom he referred to as the "lowest paid persons" and "obviously more deserving"—with the help of Tucky Williams, Cathy Swanson (later identified as his fiance), and Becky Scholl.

Thereafter, Whitman wrote out a draft of his lottery memo which, he said, explained why, as a matter of principle, he could not accept the Company's pay raise. Williams typed up a memo in her home one evening, he said, and Whitman arranged for the printing of 75 copies of it. Then, on September 23, during less than 15 minutes of the lunch period, Whitman distributed between 35 and 40 copies of the memorandum on company premises (third floor where the lunchroom was located, Tr. 61–62) to persons he recognized as nontechnical people (and to those he learned were, after talking with them).

After lunch Whitman learned from "Janet, at the switchboard" that Wuerch had made three copies of his lottery memo, and in the afternoon he noticed that there were "lots of closed doors." On the following day, around lunchtime, Wuerch summoned Whitman and the two talked alone in Wuerch's office for approximately 30 minutes about Whitman's lottery memo. According to Whitman, Wuerch was angry, livid, and "almost out of control." Whitman recalled the discussion on direct examination as follows:

> . . . he had a copy of my memo and a large binder containing the company's personnel policy. He asked me if I was responsible for the memorandum and I stated that I was. He then quoted me the passage from the personnel manual dealing with solicitations. In that it is stated that they could not be done on the premises, period, regardless of the time. I commented that it was different from what was contained in the employee handbook. He then stated, "Yeah, you were real careful," and proceeded to quote me this same passage again, word for word.

Later on that day, Wuerch called Whitman back to Wuerch's office and asked Whitman to sign a document (G.C. Exh. 4) that recited that Whitman "agreed not to hold his drawing, hand out literature or discuss his drawing on our premises." The document was in the form of a memorandum. Both signed it and dated their signatures. Whitman gave his view of the transaction as follows: "I was called back in; he read the memo to me, and asked me to sign it and I felt I had no choice."

Whitman soon recognized that the memorandum he had signed on September 24 had put him "in a very difficult situation" as coworkers wanted to know "if the lottery was for real . . . and what was going to go on." He thought, however, he had effectively dealt with the problem through use of a cardboard sign (G.C. Exh. 7) that stated, "CAN'T TALK ABOUT 'IT' DURING WORKING HOURS OR I'LL BE FIRED." He placed the sign in the top in-basket on his desk; when someone asked about the lottery, he would point to the sign and continue working. They would read the sign and go away, he said. On the following day, after the first (and only) winner's name had been drawn, he added to the sign the words, "LUCKY PERSON PATTY SAITO," to inform coworkers in the same way who had won. He thought between six and ten or "somewhere in there" had approached him about the outcome of the lottery.[8]

Patty Saito's name was drawn from a hat the evening of September 24, the night before payday, according to Whitman, by a 5-year-old girl at the home of Cathy Swanson. Whitman said he had placed the names of the nontechnical employees in the hat. Other coworkers

[8] Whitman was asked later when he appeared as a rebuttal witness why he had not approached Wuerch about how to handle inquiries about his lottery. His response was, in part:

> . . . [Wuerch] was extremely angry over this entire situation and, quite frankly, it never occurred to me to go back in there again to say, "Hey, people are going to come up and want to talk about this, I'm in a difficult situation" . . . .

present at the drawing, in addition to himself, were Cathy Swanson, Barbara Layland, and Becky Scholl.

Whitman described how he delivered the award to Saito on September 25 as follows:

> The following morning on break I met Patty down in the lobby of the Denny Building on the ground floor, off company premises and I commented to her that I was taking some heat on this thing and could we step outside the building so we were physically outside the Denny Building on 6th Avenue. And I had the check in my hand. I apologized that it was somewhat less than the 40 dollars I quoted in my memo, it came out to thirty-one dollars and some cents. I gave her the check and told her to do whatever she liked with it and then I went on to coffee.

Whitman said he was called into Wuerch's office the next morning, September 26, around 9:55 a.m. and fired. Whitman said Sagara was with Wuerch, and they sat opposite him across a desk. Whitman remembered the meeting as follows:

> . . . Wuerch wanted to discuss the lottery and I referred to the memo of the 24th. It clearly stated that if I talked about it that meant immediate dismissal. There was no question in my mind I would be fired if I talked about it. . . . And so I asked them to amend the memo to allow me to discuss it . . . . I felt I might be being set up and I was there alone, Wuerch had a witness, we were behind closed doors. The previous day one of the other supervisors in the office was watching every movement I made. I was simply trying to cover my ass, it's just that simple.

There was some discussion. Whitman said, "Wuerch stated that, in their view, I had violated the memo by holding up the paper at the desk and that I was terminated."[9] He said he was then given his final check which had already been made out.

Whitman stated that on the following Monday he called Vice President "John Gordon in the head office in Federal Way" to inquire about an appeal of the termination. After indicating some concern about what might happen the next year if the raise did not meet Whitman's expectations, Gordon told Whitman he would speak to Wuerch and be in touch with Whitman on the following afternoon. Gordon called Whitman later and reported that he had spoken with Wuerch and that "the decision stood."

Whitman said he was aware of the no-solicitation policy contained in the employee handbook (G.C. Exh. 6) that is distributed to new employees of Respondent. He stated that he did not know of the policy statement appearing in the Company's personnel manual (G.C. Exh. 2), however, until September 24 when he was asked by Wuerch to sign the joint memo. He said he had been aware of various solicitations and literature distributions that had taken place on Respondent's premises. Among them were memos or papers that featured or referred to: a drawing for a promotion trip to Yugoslavia; dirty jokes; salvaged goods from the Claims Department; United Way Campaign; Toys for Tots at Christmas; and the Salvation Army. He agreed (on cross-examination) that there had been no games of chance, such as football pools, that had taken place since he had been employed at United Pacific Reliance.

It was apparent from Whitman's testimony that he had a good memory, that he was a precise, if not fastidious, person, and devoted to certain causes. He was graduated from the University of Washington and had served as a VISTA volunteer in Hawaii "fifteen months plus one week" working among refugees who had fled Laos. He agreed on cross-examination that the Company had granted him a leave of absence of "seven weeks, two days" in order that he might visit and work with Hmong families that had been more recently relocated in Wisconsin. Also, he acknowledged that the Company had assisted him in exploring a possible transfer to Los Angeles.

Whitman conceded that the September 24 joint memo had not prevented him from discussing his lottery on nonwork time or from making an award of the prize money. He also acknowledged that there had been national publicity concerning his discharge (see R. Exhs. 1(a)–(d)). Asked if he had not told Wuerch and Sagara on the day of his termination that, "The press is going to love this," he responded:

> I may have. As I recall, I told him, "This can't stop here." As I, you know, after they told me I was fired I again referred to this memorandum. I stated I didn't hold my drawing on the premises, I didn't discuss the drawing on the premises. And I requested the specific reason I was being terminated in writing and they refused that request. So I felt that I would have to—I was fired at that time and I was angry for being fired when I obviously did nothing wrong. I didn't violate the memo. . . .

He also stated that at one point he had told Sagara that, "If you had just taken back the pay raise this wouldn't have happened."

James L. Wuerch, Respondent's Seattle branch manager, was called to testify on the General Counsel's case-in-chief and later appeared as a defense witness for Respondent.

Wuerch's recollection of the events surrounding Whitman's discharge was not too different from Whitman's.

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[9] Whitman was asked on cross-examination if he had not refused to discuss the joint memorandum unless it was rescinded, also whether he had not in fact been insubordinate. He answered both questions in the negative. Whitman said:

> They wanted to discuss the lottery and I referred to the memo that stated in no uncertain terms that if I discussed this point on the premises that I would immediately be dismissed. And that was the reason I asked that the memo be amended, to allow me to discuss it. I didn't ask that it be rescinded, amended was the word I used.

Whitman indicated that he should not have been asked to discuss the joint memo unless it was amended in writing: "A little handwritten scribble on the bottom would have been sufficient for me on my copy."

Whitman testified on rebuttal that he was told he was terminated before he had a chance to fully explain the need for an amendment to the memo agreement that he had signed. He said, "There finally was some discussion after that."

He disagreed with some statements that Whitman was to make later when the latter testified. Wuerch indicated, for example, that Respondent's nontechnical employees, whom he referred to as clericals, were not necessarily (not always) the Company's lowest paid employees.

Wuerch said he terminated Whitman on September 26 "for violating an agreement between him and myself, plus insubordination." He said he did so, as stated in an affidavit given to a Board agent, after determining that Gordon and Sagara felt, as he did, that Whitman had discussed the lottery in violation of a memo that Whitman had signed by displaying on company time and company premises the sign with the name of the lottery winner on it. Wuerch agreed that the affidavit he signed did not indicate, however, that he had mentioned insubordination.

Wuerch testified that on September 24 he had advised Whitman of the company policy on the solicitation and distribution of literature by an employee as it appeared in the Company's personnel manual (G.C. Exh. 2) and that on that date he got Whitman to sign a statement to the effect that Whitman would not distribute anything concerning the lottery on company premises at any time. Wuerch acknowledged that Whitman was more familiar with the employees handbook rule covering the canvassing and distribution of literature than he, and he indicated that he thought Whitman had tried to entrap him. Wuerch noted that when he referred Whitman to the Company's policy that appeared in its personnel manual on September 24, Whitman pointed out that the "rule differs [from the handbook] and so I knew he had studied it very carefully."

Wuerch stated the final decision to terminate Whitman was his. He said that he, Gordon, and Sagara "sure in the heck considered" discharging Whitman on September 24. And he agreed that Whitman's final check had been prepared prior to the termination interview that took place on the morning of September 26.

Wuerch testified in more detail when he appeared as a defense witnesses, although, in doing so, he repeated much of earlier testimony. Wuerch said he first remembered meeting Whitman after the latter had explored, and decided against, a move to Respondent's Los Angeles branch. Wuerch recalled that Sagara had called attention to Whitman's lottery memo and that he (Wuerch) became "a little angry regarding the tone . . . ." Wuerch noted that the format of the Whitman memo was "like one of our interoffice correspondence." The legality of Whitman's lottery did not bother him initially (although that aspect was later discussed by him with Sagara and Gordon), but it was apparent, he said, that the lottery could continue on future paydays. After reviewing the Company's employee handbook and personnel manual, and after discussing the matter with Sagara and Gordon, Wuerch called Whitman in for a conference. Wuerch said he explained that the passing out of the memo presented "a serious problem" and an agreement was needed to keep it from happening on "our premises." Whitman's attitude was "not good," however, and Wuerch "became angry." Wuerch testified that Whitman claimed that Sagara had told him to "give it away," and observed that he "couldn't figure out why it was such a big deal." Again, Wuerch said he felt that Whitman was trying to trap him and that he must be "extra careful" dealing with Whitman. Quoting Wuerch:

> I started reading him our official policy out of our manual and Mr. Whitman broke in and said, "That isn't what the handbook says," and, really, at that time, I knew then we had something going, at least I felt we had something going . . . .

Wuerch thought, nevertheless, that he had obtained an appropriate agreement covering what Whitman could do and could not do. Wuerch said he did not intend to forbid Whitman from having his lottery off the premises. He agreed (on cross-examination) that he "was mistaken" in failing to limit the agreement to worktime.

Wuerch stated he had not been involved in Whitman's 1980 salary increase and had never discussed it with Whitman. He again said he considered terminating Whitman when he first learned of the lottery memo and indicated that he probably had his final check prepared (paying him through September 30) in case his first meeting with Whitman about the lottery should lead to insubordination. Wuerch said he did not terminate Whitman when he first discussed the lottery announcement in accord with his normal practice of thinking about things overnight. He again considered terminating Whitman on Thursday, the following day, when he heard Whitman had a sign at his desk. Wuerch said:

> . . . I was informed Mr. Whitman had a sign at his desk, on the company premises, during the company time, stating, "I cannot discuss this or I will be fired. The winner is Patty Saito." I didn't know the name. I didn't know the name at the time; I found that out later. But I knew it said "The winner is," and said somebody's name.

Wuerch said that he and the other two company officials were in agreement that Whitman had discussed his lottery "on the premises in violation of our agreement and that he would be terminated," but "we thought about it overnight to Friday morning."[10] The next morning the officials felt the same way, and Whitman was called into Wuerch's office. Wuerch said he "wanted to be extra careful" and had Sagara present as a witness. Wuerch said he brought up the subject of the use of the sign, but Whitman responded that he could not discuss it without "something in writing" to allow him to do so. Wuerch said he told Whitman he did not give things in writing and that it was necessary to discuss the problem. Wuerch said he then sat back and concluded that this was the "final straw." Wuerch stated that he told Whitman in so many words that Whitman was being terminated "for the reasons of the sign, which is in violation of our agreement, and insubordination in not discussing this." Sagara and Whitman "were going at it" then, but Wuerch said he "turned [himself] off at that time."

Wuerch indicated that he would have tolerated Whitman's sign if Whitman had not added to it the name of

[10] Quoting Wuerch on cross-examination: ". . . by putting the winner's name, that is the discussion of it.

the winner. He said he could understand "in certain circumstances" that Whitman would tell someone who asked about the lottery, "I'm sorry, I can't discuss it." But it had become a "game, a push, push, push." By adding the name of the winner to the sign, according to Wuerch, Whitman violated "the spirit of our agreement not to disrupt the office on company time and premises . . . ."

Ronald Seay was called by the General Counsel. At the time of the hearing, Seay was supervisor of loss control and audit, the position that Orville Swanson had held when Whitman was discharged.

Seay said he learned loss control operations from Whitman when they both worked for another insurance firm, Chubb and Sons. Seay said he spoke with Wuerch a few minutes after Whitman's termination and received assurance that he (Seay) "had a job there and no problem." Seay stated that he was concerned over his own status "since I had recommended Bill to the company and we were good friends."[11]

Seay was generally supportive of Whitman's position. He was not involved in the operation of Whitman's lottery but, when told that Whitman was going to hold one, he thought "some good results" could come from it. Seay said:

> He was going to help out the low paid clerical in the office because everybody had such bad salaries, increases weren't that good, we weren't keeping up with inflation, since eight per cent was an insult to him he was going to take that increase, net increase, and assist other people in the office. To me, I thought it would, again, get management interested to the point that maybe something could be worked out to help in the company. . . .

Seay indicated that he, Tucky Williams, and Jack HasBrouck, as well as Whitman, were concerned "about the salaries and the disparities and the fact that the inflation rate was so high" when they asked for the September 11 meeting with Supervisor Swanson. The Company had "supposedly" set pay increases at 8 percent—an amount Seay considered "ridiculous when the inflation rate was 18 percent"—but some people got more and others were given even less by the Company. According to Seay, Whitman spoke "basically" for just about everybody in the office at the September 11 meeting. Seay also testified:

> I personally talked with Gary Sagara about Tucky's salary. And also about Bill's, after Bill received an eight percent, because I thought it was unfair when Bill was more experienced than me for him to get an eight percent when I got twelve percent.
>
> . . . Salary was a constant topic of discussion and many times when we met with others even, you know, just to sit down at a break.

Seay indicated that he was unaware of any rule restricting solicitations or distributions on Respondent's premises until after Whitman was fired. He recalled the circulation of announcements pertaining to a variety of events—e.g., an agent's party, a promotional dinner—and that collections were made for some of them. He said there had been an employee fund for use in purchasing "going away presents" for persons leaving the Company, but he had heard nothing about it after Whitman had been discharged.

Eleanor "Tucky" Williams identified herself as a "telephone auditor" in Respondent's loss control department and stated that she had been in the employ of the Company for over 14 years. She corroborated the testimony of Whitman and Seay concerning the meeting that the employees in her department—Whitman, Seay, HasBrouck, and herself—had had with Supervisor Swanson in early September and other discussions employees had held on "the issues of eight percent increases."[12]

Williams recalled that the meeting had not resolved the salary problem and that Whitman thereafter decided to have a drawing to give away his raise. She also remembered that Whitman had told her that Sagara had said he (Whitman) could give away his increase if he did not want it. Williams said she typed the lottery memo (G.C. Exh. 5) at her brother's house on Tuesday night (September 23) and gave it to Whitman on the following morning. When she did so, she advised him that she "didn't feel the company would like what he was going."

Williams said she knew of the "no solicitation" policy contained in the handbook given to employees. She indicated, however, that she thought the policy had not been enforced. She said she had collected money from employees on a monthly basis for the employee fund that had been used to obtain "gifts for funerals, births, illness." She had collected $8 each from 40 people for the "Orv Swanson luncheon." She recalled that she had distributed a memorandum about the luncheon during working hours with Wuerch's permission. There was also literature distributed for a function for Art Allen when he became a vice president of the Company (G.C. Exh. 8). There had been other solicitations and distributions. Christmas items, such as candy and Santa Claus dolls, had been sold to employees, and football and baseball pools had been held. She agreed, however, that the pools had been discontinued in 1978, before Whitman had come to the Company, and that Art Allen had once told her to put Santa Claus dolls away.

Williams indicated that she believed that distributions and solicitations could be done by employees because "some of the things" she had collected for with "management's permission and guidance." She understood that solicitations and distributions by nonemployees—"strangers coming in from the outside to sell, say at the switchboard or on through the office"—were subject to a different standard. She agreed with the statement, offered

[11] Wuerch testified that he did assure Seay that Whitman's discharge did not affect his position with the Company. Seay "can stay there forever" with the Company, Wuerch said.

[12] Williams agreed on cross-examination that the department held regular meetings. She thought the September meeting dealt with the department's business a little more than with the salary problem—"55–45 percent, maybe, yes."

on cross-examination, "that things that were company sponsored could be done on company time but things for private gain were restricted and not to be done except during breaks and lunch."

Williams agreed on cross-examination that Whitman had at his desk the sign announcing the name of the winner of his lottery (G.C. Exh. 7) and that, when questioned, he had showed it to employees during worktime.

Cathy Swanson said she had worked for Respondent for 12 years. At the time of the hearing she was a senior group secretary.

Swanson testified that she had become aware of the no-solicitation rule that appears in the employee handbook when Whitman was terminated. She expressed the view that the rule had not been enforced and, in support of her opinion, cited several examples of what she considered to be violations of the rule. Quoting from her direct examination:

> There were tickets for Sonic games, Mariner games, King Tut, there was occasionally circus tickets, there were luncheons, et cetera, given for promotionals, retirements, going away. There was a trip to Dobrovnik, there was salvage, candy.

The names of persons interested in tickets for various events would be put in a box. Names would then be drawn and announced. She recalled the distribution of a memo and an order form for candy. Thereafer the delivery date would be announced over the "P.A. system," and employees would then pick up candy that they had ordered in the conference room on company time. Swanson identified copies of literature distributed on company time to announce 1980 functions in honor of two employees (Arthur Allen and Dick Robbins, G.C. Exhs. 8 and 9).

A supervisor, Ray Wise, had sold Avon products on company premises, she said. Also, employees wanting to participate in the employee fund would contribute something like 25 cents each month for use in purchasing "going away gifts and baby gifts, flowers, if someone was in the hospital, things of this nature." Swanson acknowledged that the employee fund had been discontinued in early 1981 and that Ray Wise had left the Company in early 1979, but she recalled that Mariners' tickets had been available for employees on one occasion in August 1981.

Swanson said she, Becky Scholl, and Barbara Layland had discussed Whitman's lottery with him. Asked if she were supportive of the idea, she explained:

> If he felt this was something he needed to do, I wasn't against him. It was maybe not something I, myself, could have handled doing but I wasn't against him proceeding with how he felt.

She confirmed that the name of the winner of Whitman's lottery was drawn at her home and that thereafter she had called and left a message with Barbara Layland for Patty Saito to meet Whitman in the building lobby on the morning of September 25 to claim her award.

John M. Gordon has been an employee of Respondent for more than 21 years. He has been vice president and director of Human Resources since July 1980. Gordon stated that "Human Resources" is the modern term for "personnel" but explained that his department's "role, really, is more of an educator, teaching or helping people to learn the art of dealing with people." Gordon said the Company sends out a monthly newsletter ("Insight") and holds regular management seminars in an effort to help supervisors deal with problems of employees.

Gordon testified that he was responsible for overseeing salary administration. A salary-administration policy in effect at the Company calls for, among other things, the first-line supervisor to initiate a salary change and a series of review by higher management. Gordon indicated that it was difficult to determine salary increases in the 1979–1980 period because "there was a great deal of confusion as to what President Carter was going to do with the voluntary wage guidelines for the year 1980." The Company decided, he said, to grant *average* merit increases for 1980 in the amount of 8 percent.

Gordon identified a letter he had prepared which disclosed percentages of increases given in Whitman's department in 1980 as follows (R. Exh. 4):[13]

Orville Swanson	6% Merit	102%
Ron Seay	12% Merit	100%
Bill Whitman	8% Merit	102%
Jack HasBrouck	7% Merit	105%
Steve Gurr	8% Merit	98%
Tucky Williams	7% Merit	96%

48% ÷ 6 = 8%

Gordon explained, as indicated in the letter, that the Company's 8-percent-average increase did not mean that all employees received an 8-percent raise:

> Now, that was not to say that everyone would receive an eight-percent increase. That was to say that in an average unit or branch or department that we hoped that the average increases come out to be eight percent. That would mean, just the simplest example, if someone received a ten-percent increase that someone would receive a six-percent increase to achieve this . . . .

Gordon also explained that the 8-percent average rule did not apply to promotional increases.

Gordon recalled being consulted by Sagara about Whitman's refusal of a raise and telling Sagara that he should not take back Whitman's increase. "It was difficult to believe someone was serious about this kind of thing," Gordon testified. He said he told Sagara: "There is a United Way Drive going on now; if he does not want his money, there [are] causes out there that I'm sure would be happy to get it." Wuerch later telephoned,

[13] Gordon explained the percentages on the far right of each name as follows:

> The figures on the far right, the percentage figures, are a figure that we refer to as a convert ratio compa-ratio and I started out by saying we started by creating salary ranges and at the mid-point of a salary range is the average salary paid for a particular work function in an area . . . .

on September 23 or 24 Gordon thought, and told Gordon of Whitman's lottery memo. Gordon testified that he was concerned at first about the legality of the lottery but then became "bothered that there was an inference that our employees were poor people." The lottery idea struck him as "very bizarre," he said. Gordon agreed with Wuerch that Wuerch should inform Whitman that there was a "potential problem" involved in operation of the lottery. Gordon remembered that he and Wuerch discussed the fact that the policy statements appearing in the employee handbook and in Respondent's personnel manual were not the same and that he had told Wuerch that the one in the personnel manual was the one to be discussed with Whitman.

Gordon also recalled receiving a later call from Wuerch, he believed on the afternoon of Thursday, September 25, and getting the report that through the use of a sign on Whitman's desk, "at least in Mr. Wuerch's eyes, the agreement that he had or discussed with Mr. Whitman" had been violated. It was Gordon's recollection that he agreed at that time with Wuerch that Whitman had violated the agreement. As he recalled the conversation, Gordon "suggested to Mr. Wuerch that he discuss this violation with Mr. Whitman and, depending on the result of the discussion, would determine Mr. Whitman's future with the company."

Gordon stated that Wuerch made the decision to terminate Whitman and also determined the following week that Whitman should not be rehired. Gordon said Whitman telephoned him on the Monday following the discharge (September 29) and inquired about the possibility of returning to work for the Company. Gordon was impressed with Whitman's "demeanor and attitude" at the time and promised to consult with others concerned in making such a decision.[14]

Gary Sagara testified that he had been an employee of Respondent for 11 years and the administrative manager for the Seattle branch office since January 1978. His duties include, among others, the "human resource function."

Sagara recalled that Orville Swanson had reported to him between August 31 and September 2 that Whitman had declined a salary increase. Sagara relayed the information to Gordon, who advised that the raise was warranted and that the Company wanted Whitman to accept it. Whitman approached Sagara on September 2 and questioned the Company's methods in determining salaries. The cost of living was discussed, and Whitman ended up asking that the Company take the increase back. Sagara testified:

> [Whitman] said it was a matter of principle, that if he could not keep up the cost of living and we did not intend to pay him at that level, then he did not want to have anything at all at that point.

Sagara said he told Whitman, in response, that the Company could take it back, but it would not do so. Sagara suggested, as indicated in the following quotation, that Whitman could give away his increase:

> Well, he continued to come back to the point of principle; it was against his principle, and I simply said at that point, "If it is the net increase or the net amount that is involved in your principle, then you can take care of that by either contributing that to the United Way," which was going on at that point, and I think I also made a suggestion that he could also consider putting that into the credit union at that point, at least his net pay, it would not be affected.

Ron Seay also initiated a conversation in early September about the cost of living, Sagara recalled, and "brought Bill's name into it." Seay had indicated he had been disappointed in the amount of the raise "until his wife had received hers, which was even less than his." Sagara maintained that Whitman had only spoken of his own situation and not of others.

Sagara stated that Orville Swanson had mentioned, also in September, that he (Swanson) would be attending a meeting with loss control personnel at which it was expected that the subject of salaries would come up. Sagara said he gave Supervisor Swanson a "refresher" on the Company's salary program and offered to appear at the meeting with him. Sagara suggested to Supervisor Swanson that individual salaries should not be discussed openly. But Sagara claimed that the company had encouraged group meetings at which salaries would be discussed. He made the point that there had been such a group meeting, attended by approximately 120 employees, in April or May 1980, and that no one from the loss control department had raised a question on the subject.

Sagara said he learned of Whitman's lottery memo shortly before lunch on September 24. "Pat Wasser stuck his head in the door and simply indicated I would probably want a copy of the memo that was being distributed," Sagara recalled. Sagara later observed employees in the lunchroom " with papers" in their hands. Audrey Williams showed him a copy of the lottery memo which, he said, caused him to react with disappointment, primarily because "we had worked with Bill quite a bit up to that point to try and take care of what he considered his needs were"[15] Sagara felt Whitman was making a "mockery at the things we tried to do up at that point."

After lunch Sagara gave Wuerch a copy of Whitman's lottery memo and made a comment to the effect, "I simply think we have something to deal with here."

[14] Gordon said he talked with Whitman at some length about the situation. Gordon said: "I suggested to him that, you know, our employees really are not, at least we don't consider them to be welfare recipients or poor people, and that I found it very difficult to believe his way of accomplishing this salary thing was the way to go. He seemed to, as best you can tell by talking to someone on the phone, to at least accept what I was saying . . . ." Gordon talked with other officials of the Company, including the home office manager of loss control audit (Zekes) and Wuerch. Wuerch decided that he "was going to stick with the termination," and Gordon passed along the information to Whitman 2 or 3 days later.

[15] Said Sagara: "We had worked with him to effect a transfer [to Los Angeles] that he had requested shortly after returning from that leave of absence" that had been granted him only after being employed by the Company for 6 or 7 months. Sagara said Audrey Williams had asked him whether she "qualified" for Whitman's lottery.

Sagara and Wuerch discussed the situation later that day and, after noting that "there was a difference" in the Company's personnel manual and the employee handbook, Wuerch contacted John Gordon for a "clarification." The three officials—Sagara, Wuerch, and Gordon—determined that Whitman should be contacted and asked to agree that "if he was going to pursue his lottery in that fashion that he would have to at least do it so it would be not done in a disruptive fashion."

Sagara testified that Respondent's officials thereafter gained information indicating that Whitman had held his lottery away from the Company's premises but was advising employees of the name of the winner by use of a card at his desk. It is obvious that Sagara, Wuerch, and Gordon then began to think seriously about terminating Whitman. Sagara testified:

> At that point we were attempting to determine whether in fact he had violated the agreement he had made with Jim Wuerch the day before whenever that first meeting occurred. And we recognized that, in the memo that he had signed, it indicated premise and Jim had indicated to me that he thought he had made that perfectly clear to him that he meant on company time and premise and at that time I was a little uncertain as to whether or not he was doing this on company time or not. We were sure that he was doing it on the premise but, since there seemed to be such confusion on whether or not there was a question on company time or on company premise, we were going to make darn sure that if in fact there was a termination that Bill had violated both the agreement on the basis of premise and on the basis of time.
>
> . . . We had talked to John Gordon again and indicated to him what was brought to our attention as far as the way Bill had conducted himself and asked if he concurred that this was in violation of the agreement that Bill has signed. And Jim indicated to him at that time that, if in fact he had done that, and by "done that," I mean had displayed his card openly during working hours or on the premise, that he felt it was a violation of the agreement and, as such, we would invoke a termination.

A check was prepared on September 24 (R. Exh. 9), but it was not delivered by Wuerch until Whitman was terminated on September 26.[16]

Sagara thought Whitman "had that sign on his desk for more than one day," having "updated it once he had selected his winner." Sagara said that on September 25—payday and the day that the winner had been given her award—he, Wuerch, and Gordon again conferred and decided they needed "to substantiate that he had it on his desk during working hours and that he in fact was flashing his card as people walked by." On the following morning, Friday, September 26, Sagara and Wuerch met with Whitman. Wuerch opened the meeting by referring to the agreement that Whitman had signed and then stated that "there was some indication" Whitman had violated it. Whitman would not respond but held a piece of paper (G.C. Exh. 4, the memo agreement) in his hand, "wiggling" it. Finally, Whitman spoke and explained that he could not discuss the matter until Wuerch were to "rescind this memo or write a retraction on it" or something to that effect. Wuerch explained to Whitman, Sagara said: "We do not have to do that in my office. You can talk with me." Whitman again responded that he would not be able to talk without a retraction. According to Sagara, Wuerch was then moved to speak:

> Well, at that point Jim simply said, "Well, what we are acting on is the fact that you had violated the agreement by discussing the—you had violated the agreement by flashing the card during working hours and we are assuming that is correct at this point and, as such you are terminated."

At this point, according to Sagara, Whitman did talk "finally" and went into "a complete tirade . . . talking about nuclear energy, nuclear proliferation and all kinds of other things." Before leaving the meeting, Sagara said Whitman stated: "Well, the press is going to love this." Sagara said he saw Whitman after lunch when Whitman turned in his equipment and noticed he was "pretty calm at the time." Whitman observed then: "If we could have only taken his money back we wouldn't be faced with this situation," adding that a matter of principle was involved. Whitman asked how his agreement had been violated, and Sagara said he told him: "Well, by showing that sign during the course of the working day you were violating that agreement."

Whitman "walked" Sagara over to the desk, and Sagara "finally saw the card for the first time."

Sagara said he was later contacted by Wuerch about the possibility of Whitman's reinstatement. Sagara said he opposed Whitman's return, explaining in part, that "we tried to work with him as much as we could to meet his wants" but "the first time we have a problem . . . he had to take such a drastic role with us."

Solicitations and distribution of matter at Respondent's Seattle branch fall within the province of Sagara and Wuerch, Sagara said. He stated that employees had been allowed to bring "in their own special type of gifts or something they had made and possibly" sell them in a nondisruptive manner at Christmas time. Also, the Company continues to receive tickets for various events, and they are distributed to employees by means of drawings. Sagara also acknowledged that there had been certain so-

[16] Sagara acknowledged that company officials had considered terminating Whitman from the time they first learned of his lottery memo, but they were concerned about the effect of the conflicting policies contained in the Company's personnel manual and the employee handbook. Sagara said:

> I think we would have to go right back to the original discussion we had with John Gordon right after the memo came out. In fact—but we felt that Bill—since the handbook was not clear with the policy manual and that Bill had not had any opportunity to sit down and discuss this with us, that we owed him that right. And, as such, then Jim decided he would talk with Bill and try to reach a meeting of the minds so that Bill could maintain his principles, keep them intact, and do what he felt he had to do, and at the same time understood.

licitations (e.g., "Toys for Tots" and parties for employees) permitted, but he considered them to be for the benefit of employees and in compliance with the Company's solicitation policies. The only "outside" solicitation allowed is the "United Way" charity drive. Sagara stated that baseball and football pools have been banned (R. Exh. 8), and the sale of candy to employees was discontinued around 1978.

Sagara testified on redirect that Whitman was terminated for violating the memo agreement (G.C. Exh. 4) "by showing his card throughout the day . . . on the premise." He had agreed while testifying on cross-examination that the agreement and the personnel manual policy statement (G.C. Exh. 2), which had been relied on in drafting of the agreement, made no reference or qualification to company time or work hours. Sagara also stated (on redirect) that he had reviewed the draft of the memo, at Wuerch's request, before it was given to Whitman for signature and that Wuerch had indicated that it should prevent Whitman from conducting "his lottery on the premises during working hours." And he recalled that later on, when trying to determine whether there had been a violation of the agreement, that he, Wuerch, and Gordon had focused on whether "flagging people as they came by his desk" involved the "discussing" of Whitman's lottery. Sagara indicated that he thought the agreement allowed Whitman to state "verbally" to employees that he could not discuss his lottery. He also indicated that the agreement would have allowed Whitman to talk about his lottery on nonwork time.[17] Sagara agreed that he knew of no other employee of Respondent in Seattle who had been disciplined for violating a no-solicitation policy, but he added that there had been no solicitation requests from employees that had been denied.

Orville Swanson, who as control and audit manager had supervised Whitman prior to his discharge, testified that he had a meeting with the employees in his department at which Whitman "wanted to talk about salary." O. Swanson thought the meeting took place at an earlier time than September 11 (as Whitman and others had testified), but he could not recall when it did occur. He acknowledged that Whitman had asked for the meeting for an opportunity "simply" to talk "about things in general." "We talked about territorial assignments [and] individual responsibilities" for about a half an hour, O. Swanson said. He told Whitman at the meeting that it was not his policy to discuss "salaries in general" but offered to speak on the issue on an individual basis. He said he recalled that Whitman was the only one to come to him to discuss a "particular salary. Asked if Ron Seay had complained about wages, O. Swanson responded: "Not in a specific sense. Mostly in a general sense."

[17] Sagara said he was concerned that Whitman "understood he was . . . not to talk or discuss about it during working hours." Quoting futher from Sagara's testimony: ". . . What we were looking at is whether or not the simple game playing and poking right back at the fact that Jim had written the memo and had Bill sign the memo and thought it was reasonably done, it was reasonably done in good faith, even though he admitted he was a little angered during the initial meeting with Bill, and that whether or not this, in fact, was nothing more than insubordination."

O. Swanson had retired shortly before the trial but appeared eager to support Respondent's cause. He seemed evasive at times, but perhaps he only had a poor memory of the relevant events. After seeing his affidavit taken shortly after Whitman's discharge, he observed: "It has been a year." He agreed that he had commented on the departmental meeting in his statement as follows:

> It was apparent to me that there had been some homework done by Whitman, by the response of other employees in support of his comments.
>
> It seemed obvious to me the four of them had gotten together on this before the meeting.

O. Swanson also agreed that Seay had spoken up at the meeting in support of Whitman's comments and that he (Swanson) had told the employees in attendance that he would relay their concerns regarding the relation of the wage increases and the cost of living onto management.

Jean Burke, an employee of Respondent for 9 years, testified that she is administrative assistant to Gary Sagara. She performs supervisory duties at the front desk reception area and assists in the personnel function. She has issued employee handbooks to new employees and given them orientation.

Burke said she instructs employees at the front desk not to accept anything for distribution to employees. She said she is "pretty much" responsible for the "United Way Campaign" and has "put out bulletins" explaining how it is to be handled. She has also distributed memos concerning "blood drives in the past." Burke said employees are not to do things for their private profit "on company premises on company time." Football and baseball pools are not allowed, and the former practice of allowing employees to purchase Rogers Candy on company premises at Christmas was discontinued in 1978. In March 1981 the employee fund was discontinued because "basically a lack of interest." She described the operation of the fund as follows:

> The employee fund was where employees could join and give so much per quarter, a donation-type thing. It was set at $1.00 per quarter and that, in turn, was set up to buy gifts for either a wedding or retirement, those sort of occasions, or if someone was leaving the company or terminating.

With respect to Whitman's memo announcing his lottery, she said "someone brought me a copy of it." She said, "I saw several conversations regarding that and I also had conversations, people stopped by my area and talked about it to me."

Alice Hazel said she was a nontechnical employee and the supervisor of record files. She said she saw a copy of Whitman's lottery memo on her desk and, thinking possibly that it was a joke, threw it away. She later saw "quite a few" persons looking at the memo in the lunch area.

Hazel said company policy forbade solicitations during worktime. She said there was an "Avon book" in her department, but she told the employees to look at it "only at lunchtime."

Partick Wasser, assistant claims manager of United Pacific Reliance, testified he saw Whitman's lottery "announcement" at the reception desk one day, just before lunch, around 11:35 a.m., as he recalled it. He did not recall the day or the month. The gist of his testimony was:

> . . . I noticed three girls, the receptionist being one of them, laughing over a piece of paper. I thought perhaps it might have been a joke that was being passed around the office so I asked innocently if I might see and they said, "No, you can't see this," and I said, "Why not," feeling ostracized, and I said, "Come on, I've seen all the jokes, you can let me see it" and they said, "No, no, this is for nontechnical, clerical, people only." I forgot the exact conversation at the time. And I said, "What do you mean," and we talked a little bit more and they allowed me to see it and I looked at it and kind of just thought, well, this was different, and checked out and went to the elevator. I thought, perhaps the office manager needs to see this because it is really something that didn't need to go beyond where it was. And I went back into Mr. Sagara's office and I think that is when I told him that he ought to see this piece of paper that is being passed around the office.[18]

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exericse of the rights guaranteed in Section 7." Section 7 of the Act provides, in part, that employees have the right to engage in "concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . ." The Supreme Court in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), involving a walkout by seven workers in an unorganized machine shop, held that Section 8(a)(1) was violated in the absence of any union activity. The Court found the workers' protest to be concerted activity as it involved employees' working conditions, i.e., inadequate heat. The fact that the employer had a plant rule forbidding employees to leave work without permission did not provide "justifiable 'cause' for discharging these employees, wholly separate and apart from any concerted activities in which they engaged in protest against the poorly heated plant." The Court stated that the right to discharge employees for cause "cannot mean that an employer is at liberty to punish a man by discharging for engaging in concerted activities which Section 7 of the Act protects." The Court did note, however, that not all concerted activities are protected by the Act. The Court said, 370 U.S. at 17:

> It is of course true that § 7 does not protect all concerted activities, but that aspect of the section is not involved in this case. The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful,[14] violent[15] or in breach of contract.[16] Nor can they be brought under this Court's more recent pronouncement which denied the protection of § 7 to activities characterized as "indefensible" because they were there found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities.[17] The activities of these seven employees cannot be classified as "indefensible" by any recognized standard of conduct. Indeed, concerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.

[14] *Southern Steamship Co.* v. *Labor Board*, 316 U.S. 31.
[15] *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.
[16] *Labor Board* v. *Sands Manufacturing Co.*, 306 U.S. 332.
[17] *Labor Board* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464, 477.

The court's decision in *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320 (7th Cir. 1976), involving the distribution of literature by an individual to his fellow employees on his own time and on company premises following his appearance of a grievance meeting is also instructive. The employer maintained a no-solicitation rule (negotiated between the company and a union) which allowed "no solicitation by any employee unless permission is expressly granted by the Personnel Department." The individual involved, one Joseph Mayer, had prepared and read at the grievance meeting "a personal statement of the grievance" which concerned personal treatment he had received at the hands of an allegedly negligent and careless supervisor. The grievance was not resolved at the meeting, and on the following morning, before he was scheduled to go to work, he distributed at the front entrance of the plant copies of his statement, along with another statement (prepared after the meeting) which called for support of other employees to workers as they entered the plant.[19] He was promptly

[18] I have no doubt that Whitman began distribution of his lottery announcement *after* the lunch period began at 11:45 a.m. on September 23 as he testified (on rebuttal):

> I'm a very punctual person, by nature, and my watch is set precisely. And I clearly had to follow the rules outlined in the guidebook, in the employee handbook, and I was working at my desk that morning and 11:45 came and some employees from the rear portion of the office behind me had passed me by and I looked at my watch and it was 11:45 . . . .

Whitman explained that his poor people's lottery was not really a lottery: "In a legal sense it would be a drawing because there was no fee for participation, no consideration exchanged."

[19] The second statement read (544 F.2d at 324):

> ATTENTION ALL WORKERS
>
> This case of J. Mayer v. J. Mirabella concerns ALL workers. We must not think that Mirabella is just peculiar. The company knows what Mirabella does and supports him and all other foremen who act like him. WE DON'T HAVE TO TAKE IT!!!

discharged "for taking action interpreted as a bypass of the contractual grievance procedure, distributing a document to fellow employees which attacked a supervisor in derogatory and inflammatory terms and inciting fellow employees to engage in a walkout or slowdown." In upholding the Board's findings, which were contrary to those made by an arbitrator,[20] the court stated (544 F.2d at 328):

> . . . alerting one's fellow employees to supervisory deficiencies which potentially affect on-the-job safety and performance cannot seriously be contended to further a purpose other than their "mutual aid or protection," regardless of any personal feelings of anger on the part of Mayer toward his supervisor.
>
> Nor is the fact that Mayer proceeded alone in his leafletting, without Union sponsorship, pertinent to the determination of whether such conduct is protected by Section 7. These protections are not withheld from persons who engage in concerted activity stemming from a purpose contemplated by the Act, but who act neither through nor on behalf of unions. *Indiana Gear, supra; Joanna Cotton Mills*, [371 F.2d] at 752. Furthermore, [t]he activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much "concerted activity" as is ordinary group activity. The one seldom exists without the other.
>
> *Owens-Corning Fiberglass*, [407 F.2d] at 1365. See also *Hugh H. Wilson Corp. v. N.L.R.B.*, 414 F.2d 1345 (3d Cir. 1969), cert. denied, 397 U.S. 935 (1969).
>
> Therefore, we uphold the Board's conclusion that the purpose for the distribution of the leaflet was directed toward allegedly inadequate supervision as it concerned safety, instruction and discipline, a purpose protected by Section 7.

The court's comment concerning the unpersuasive contention advanced in *Dreis* that Mayer had been disloyal to his employer and had, as a result, forfeited protection of the Act is also of interest (544 F.2d at 328, 329):

> Distribution of the leaflet to co-workers concerned a grievance which encompassed areas of legitimate concern to employees. No mention of the Company's products was made, and no attempt to expose the Company to public ridicule or contempt through the dissemination of false or malicious statements was attempted or effected . . . .
>
> Clearly, the employer retains the sole right to manage its business, including the right to discharge or discipline employees, so long as the protections afforded by the Act are not contravened. Here, however, the Board's determination that Mayer's statements were not "so offensive, defamatory or opprobrious so as to remove them from the protection of the Act" is sound and will not be disturbed.

Finally, what the court said about the employer's no-solicitation rule in *Dreis*, although not defended by the employer before the court, is of interest here:

> On its face, the rule is unrestricted in its application to employee-related activities and is clearly susceptible of overbroad interpretation and enforcement. Accordingly, the Board's finding that maintenance of "no solicitation" rule is an unfair labor practice is appropriate and we enforce it without further discussion.

It must be conceded that Mayer in *Dreis* undertook to obtain group support more than Whitman did in the case at bar. As the court noted, Mayer had sought to induce group activity, looking to enforcement of certain provisions of the collective-bargaining agreement. But apart from that consideration, the court indicated that Mayer's activity, not unlike Whitman's here, was "founded upon a purpose of alerting his fellow employees to what he discerned" as a problem in the workplace that was "a legitimate concern of all employees."

Guided by these precedents and other principles enunciated by the Board,[21] I find Whitman's "lottery" in-

[20] The arbitrator had found:

1. Mayer was not discharged for picketing or for distributing literature.
2. Mayer was not discharged for violation of a no-solicitation rule.
3. Mayer was not seeking to foment a work stoppage or strike.
4. Mayer did not, as asserted by Respondent, concoct the entire scheme in order to get himself discharged so that he might take the extended leave of absence which had been denied him and then secure reinstatement and backpay.
5. Mayer was discharged for his February 20 distribution of the 2 page leaflet, quoted supra.

[21] Not all United States Courts of Appeals may consider Whitman's activities concerted and protected. See, for example, *NLRB v. Bighorn Beverage*, 614 F.2d 1238 (9th Cir. 1980); *Aro, Inc. v. NLRB*, 596 F.2d 713 (6th Cir. 1979); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304 (4th Cir. 1980); and *NLRB v. Datapoint Corp.*, 642 F.2d 123 (5th Cir. 1981). And see *Pelton Casteel Inc. v. NLRB*, 627 F.2d 23 (7th Cir. 1980), and *Indiana Gear Works v. NLRB*, 371 F.2d 273 (7th Cir. 1967).

But Board precedents, which I must apply (*Ford Motor Co.*, 230 NLRB 716 (1977), enfd. 571 F.2d 993 (7th Cir. 1978), affd. 441 U.S. 488 (1979)), persuade me that the Board would consider Whitman's activities to be concerted and protected. See, for example, *Hotel & Restaurant Employees Local 28*, 252 NLRB 1124 (1980); *Batchelor Electric Co.*, 254 NLRB 1145 (1981); *Self-Cycle & Marine Distributor Co.*, 237 NLRB 75 (1978); and *Red Ball Motor Freight*, 253 NLRB 871 (1980). *Diagnostic Center Hospital Corp.*, 228 NLRB 1215 (1977), cited by Respondent, is of no assistance to it. There the Board found the writing of a letter of protest by an employee constituted protected concerted activity; it was not established as the reason for a discharge in the case, however, as it was not shown that the employer had "actual knowledge" of who the author was at the time of the termination. The record herein leaves no doubt about the fact that Respondent knew of Whitman's protected concerted activities.

The statement of the Supreme Court in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), to the effect that the Board is not to "wholly ignore other equally important Congressional objectives" in effectuating the Labor Relations Act in no way suggests that the decision herein must favor Respondent. It hardly can be fairly said that the wage increases which Respondent had determined for its employees became a national policy which Whitman could not protest. None of the cases relied on by Respondent (R. Br. pp. 31-32) are apposite. (It is to be noted that the voluntary "Carter Wage & Price Guidelines" relied on by Respondent had a different legal basis from the wage regulations involved in *ABC*

Continued

volved protected concerted activity. The lottery was promoted and conducted as a protest to Respondent's wage policies, a matter of interest to a number of fellow employees and one of considerable impact on Respondent's employees generally. Whitman promoted and conducted the lottery as his own protest, but the record indicates that other employees supported the protest.

It is apparent that it was the *manner* of Whitman's protest that brought on Whitman's discharging and Respondent conceded as much. After acknowledging that Whitman had complained about his raise, that "he, Tucky Williams, and Ron Seay complained among themselves about inflation and wages," and that Whitman "discussed salary at a department meeting," Respondent states (R. Br. 40):

> . . . the entire angry reaction by management was caused by Mr. Whitman's insults and game-playing beginning with his lottery announcement.

But, as stated in *Sears, Roebuck & Co.*, 224 NLRB 555, 564 (1976):

> . . . an employee's right to the protection of Section 8(a)(1) when engaging in concerted activities does not depend on his doing it in a way which does not offend his employer. If he would not have been discharged but for his employer's reaction to his protected concerted activities, his discharge violates the Act.

See also *Misericordia Hospital Medical Center*, 623 F.2d 808 (2d Cir. 1980).

Respondent's attempts to make Whitman's conduct unprotected are unpersuasive. Respondent complains that Whitman's lottery memo looked like an "official company communication" signed by him "in his official capacity." But no reasonable person reading the memorandum would believe that it was an official communication of the Company.

Respondent's claim that Whitman's conduct was disruptive is not supported by the record. The agreement forced on Whitman, admittedly overly broad because it forbade protected activity during nonwork time, may have been "commotion-inducing," but Whitman can hardly be faulted for that. The overly broad agreement, drawn up by Seattle Branch Manager Wuerch, placed Whitman in an impossible position. I am persuaded that Whitman only pointed to the sign on September 24 and 25 when asked about his lottery and that he continued to work while he did so, as he testified. Wuerch indicated that he would have understood and accepted the fact that Whitman, under the circumstances, might have told fellow employees inquiring about his lottery that he could not discuss it; but that, by putting the message in writing within the name of the winner, in Wuerch's view, caused Whitman's activity to become a game, a violation of "the spirit of our agreement" and the basis for Whitman's discharge. I reject such reasoning. Such "agreement," being based on an overly broad no-solicitation/no-distribution rule, was not a valid agreement. If Whitman breached it by "discussing" his lottery as claimed, it provided no valid basis for the discharge. In any event, Respondent's discharge of Whitman pursuant to the overly broad no-solicitation/no-distribution rule violated Section 8(a)(1) of the Act. See *Clinton Corn Processing Co.*, 253 NLRB 622 (1980); *The Singer Co.*, 220 NLRB 1179 (1975); *Groendyke Transport*, 211 NLRB 921 (1974), enfd. 530 F.2d 137 (D.C. Cir. 1976); *Samsonite Corp.*, 206 NLRB 343 (1973); and *G.V.R., Inc.*, 201 NLRB 147 (1973). Respondent made no showing that special circumstances existed that would justify the existence of such a rule. See *Groendyke Transport*, supra; also *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). Further, the disparate treatment given Whitman's distribution (while allowing other promotions—e.g., United Way, employee fund) rebuts any presumption of validity. See *Sunnyland Packing Co.*, 227 NLRB 590 (1976), enfd. 557 F.2d 1157 (5th Cir. 1977). Also, as the General Counsel points out, the maintenance of two different rules on distribution and solicitation becomes unlawful when employees become aware of the conflict. See *MGM Grand-Reno*, 249 NLRB 961 (1980), modified 653 F.2d 1373 (9th Cir. 1981).

Respondent's concern that the Board's recently announced *T.R.W.* rule (*T.R.W. Inc.*, 257 NLRB 442 (1981)) could be applied to it in this case retroactively is not well founded. The invalidity of Respondent's no-solicitation/no-distribution rule is established by a line of early cases and in accord with the theory alleged in the complaint.

Based on the foregoing, I make the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an overly broad no-solicitation/no-distribution rule which prohibits employees from engaging in protected concerted activities in nonworking areas of Respondent's premises during nonworking time.
3. Respondent violated Section 8(a)(1) of the Act by discharging, and by refusing to reinstate, William J. Whitman pursuant to Respondent's overly broad no-solicitation/no-distribution rule.

THE REMEDY

Having found Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent maintained and enforced an overly broad no-solicitation/no-distribution rule, I shall recommend that Respondent cease giving effect to the rule. And having found that Respondent discharged, and refused to reinstate, William J. Whitman in violation of Section 8(a)(1) of the Act, I shall recommend that Respondent be ordered to offer him immediate and full reinstatement to his former posi-

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Prestress & Concrete, 201 NLRB 820 (1973), and *NLRB v. Indiana Desk Co.*, 149 F.2d 987 (7th Cir. 1945).

tion, or, if such is not available, on which is substantially equivalent thereto, without prejudice to his seniority and other rights and privileges. He is to be made whole for any loss of earnings suffered by reason of the discrimination against him. All backpay is to be determined in accordance with the decisions in *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *Isis Plumbing Co.*, 138 NLRB 716 (1962); and *Florida Steel Corp.*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]